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13 UNITED STATES DISTRICT COURT

14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,
16 Plaintiff,
17 v.
18 JOSE LANDA-RODRIGUEZ, et al.,
[#3-GABRIEL ZENDEJAS-CHAVEZ]
19 Defendant.
20

No. 2:18-CR-00173(B)-GW-3

GOVERNMENT'S EX PARTE APPLICATION
FOR ORDER DIRECTING THAT ATTORNEY
COMMUNICATION BE SUBMITTED FOR
REVIEW IN CAMERA; DECLARATION OF
GREGG E. MARMARO; AND EXHIBITS

[PROPOSED ORDER FILED
CONCURRENTLY]

21
22 Plaintiff United States of America, by and through its counsel
23 of record, the United States Attorney for the Central District of
24 California and Assistant United States Attorneys Shawn J. Nelson,
25 Gregg E. Marmaro, and Daniel H. Weiner, hereby files the Government's
26 Ex Parte Application for Order Directing that Attorney Communication
27 Be Submitted for Review In Camera.
28

This Ex Parte Application is based upon the attached memorandum of points and authorities, the transcripts from the first trial of United States v. Gabriel Zendejas-Chavez, the Declaration of Gregg E. Marmaro and Exhibits A and B, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: May 23, 2024

Respectfully submitted,

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5/24/16

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court has previously ruled that certain communications involving defendant Gabriel Zendejas-Chavez could be disclosed to the prosecution team because either the communications were not privileged or the attorney-client privilege had been abrogated by the crime-fraud exception. The prosecution team recently received from the privilege review taint team (the "privilege review team" or "taint team") a privilege log indicating that a letter from defendant Chavez to Gabriel Huerta, an incarcerated Mexican Mafia member, dated May 31, 2015, was withheld from the prosecution team on the basis of the attorney-client privilege (the "**Letter**"). By this application, the prosecution team requests that the Court review the **Letter** in camera to determine whether it should be disclosed to the prosecution team.

As discussed below, the prosecution team submits that there has been a good faith showing by independent evidence for a reasonable person to believe that a review of the **Letter** may reveal evidence to establish a claim that the crime-fraud exception applies. See United States v. Zolin, 491 U.S. 554 (1989). The prosecution team submits that there exists reasonable cause to believe that a review of the **Letter** may demonstrate that it is reasonably related to and in furtherance of a crime or fraud. Accordingly, the first step of the Zolin two-step procedure has been met, see Zolin, 491 U.S. at 572, and the prosecution team requests that the Court agree to review, in a subsequent filing submitted by the privilege review team, the **Letter** to determine whether the crime-fraud exception is applicable.

//

1 **II. STATEMENT OF FACTS**

2 **A. The Independent Evidence Demonstrates that Defendant Chavez**
3 **Worked as a Conduit for the Mexican Mafia**

4 The government incorporates by reference the testimony and
5 exhibits introduced in the first trial of defendant Chavez. The
6 Court is familiar with the independent evidence demonstrating that
7 from at least 2013 through at least 2017, defendant Chavez worked as
8 a conduit for the Mexican Mafia, principally by passing messages for
9 other members and associates of the Mexican Mafia's Los Angeles
10 County Jail Enterprise (the "Enterprise"). At the first trial of
11 defendant Chavez, the government introduced evidence of defendant's
12 participation in the Enterprise, including through written prison
13 correspondence known as "kites," jail calls, cooperating witnesses,
14 law enforcement witnesses, correctional officers, visitation records,
15 seized items, and other evidence. Several cooperating witnesses
16 testified to their first-hand interactions with defendant Chavez,
17 including that defendant Chavez used his position as an attorney to
18 pass criminal messages for the Mexican Mafia through inmate visits,
19 phone calls, and written correspondence disguised as "legal mail."
20 Several witnesses testified specifically that they corresponded with
21 defendant Chavez about Mexican Mafia business through mail that was
22 marked "legal mail" but which contained criminal communications.
23 Exhibits were also introduced showing that defendant Chavez passed
24 criminal messages in letters that were marked "legal mail."

25 **B. The Independent Evidence Demonstrates that Defendant Chavez**
26 **Used His Position as an Attorney to Pass Criminal Messages**
to and From Mexican Mafia Member Gabriel Huerta

27 At the first trial, evidence was introduced that defendant used
28 his status as an attorney to pass criminal messages to and from, and

1 regarding, Gabriel Huerta, an incarcerated Mexican Mafia member whose
2 moniker is "Sleepy." A cooperating witness testified that defendant
3 Chavez passed criminal messages from co-defendant Jose Landa-
4 Rodriguez to Huerta, who was among several Mexican Mafia members who
5 were housed at the time at Pelican Bay State Prison. See Trial
6 Transcript Day 4, at 749, 764-767. The witness also testified that
7 defendant Chavez passed messages to him from Huerta regarding Mexican
8 Mafia business. See id. Visitation records admitted into evidence
9 demonstrate that defendant Chavez visited Huerta at Pelican Bay State
10 Prison on five separate occasions between October 2013 and October
11 2014.

12 At his trial, defendant Chavez testified that he met with Huerta
13 because Huerta was "anticipating a parole board hearing in the
14 future, and he wanted to consult about [defendant's] representation
15 before the parole board." Trial Tr. Day 11, at 2466-67. Defendant
16 Chavez stated that he met with Huerta several times as a continuation
17 from the plans for Huerta's parole board hearing. Id. at 2514-15.
18 However, the prosecution team has learned from the California
19 Department of Corrections and Rehabilitation, Board of Parole
20 Hearings, that defendant Chavez *never appeared* as an attorney of
21 record for Huerta in any parole proceedings, and that Huerta was
22 represented by other attorneys in parole proceedings in 2015 - i.e.,
23 the time period of the **Letter** (May 2015). See Declaration of Gregg
24 E. Marmaro at ¶ 2.¹

27
28 ¹ Specifically, in 2015, Huerta postponed and then later waived
a parole hearing for two years. In the postponement and waiver,
Huerta was represented by other attorneys.

1 **C. Item to Review**

2 On April 17, 2024, the prosecution team received from the taint
3 team a privilege log indicating that a letter dated May 31, 2015,
4 from defendant Chavez to Gabriel Huerta, was withheld on the basis of
5 the attorney-client privilege (the **Letter**). See Marmaro Declaration
6 ¶ 3; Exhibit A. In addition, the prosecution team received from the
7 taint team a search warrant application and search warrant, dated
8 June 4, 2015, from the Superior Court in Kern County, California,
9 which authorized the search of the **Letter** by prison officials at a
10 California state prison in Tehachapi, California. See Marmaro
11 Declaration ¶ 4; Exhibit B. The affidavit in support of the search
12 warrant set forth the probable cause to believe that the **Letter**
13 constituted evidence of a crime. In part, the affidavit stated that
14 defendant Chavez sent a money order in 2014 to Huerta under a
15 provision authorizing witness/advisor fees, but which was returned to
16 defendant Chavez because it failed to meet the statutory requirements
17 for such fees.

18 **III. ARGUMENT**

19 **A. Legal Framework**

20 The purpose of the attorney-client privilege is to encourage
21 clients to communicate freely and completely with their attorney. In
22 Re Grand Jury Proceedings, 867 F.2d 539, 541 (9th Cir. 1989).
23 However, "all reasons for the privilege are eviscerated when a client
24 consults an attorney for legal assistance to carry out a contemplated
25 or ongoing crime." Id. Thus, it is well established that "the
26 attorney-client privilege does not extend to communications between
27 attorney and client where the purpose of that communication is to
28 further . . . future intended illegality." United States v.

1 Friedman, 445 F.2d 1076, 1086 (9th Cir. 1971); see also In Re Grand
2 Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992). The crime-
3 fraud exception "may be used to abrogate work-product protection as
4 well as the attorney-client privilege." In re National Mortgage
5 Equity Corp., 116 F.R.D. 297, 301 (C.D. Cal. 1987); see also In re
6 Antitrust Grand Jury, 805 F.2d at 164; In re Special September 1978
7 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1980). When "the attorney had
8 knowledge of or participated in the crime or fraud," even the
9 attorney's opinion work-product (which ordinarily receives the
10 highest level of protection under the work-product doctrine) will be
11 stripped of protection. National Mortgage, 116 F.R.D. at 302; see
12 also In re Antitrust Grand Jury, 805 F.2d at 164.

13 In order to divest facially privileged communications of the
14 protection of the attorney-client privilege or work-product doctrine,
15 the government must make a prima facie showing of the existence of a
16 crime or fraud, and that "there is some relationship between the
17 communications and the illegality." United States v. Chen, 99 F.3d
18 1495, 1503 (9th Cir. 1996) (quoting In re Grand Jury Proceedings (The
19 Corporation), 87 F.3d 377, 380 (9th Cir. 1996)). A prima facie
20 showing is made if the government presents evidence establishing
21 "reasonable cause to believe that the attorney's services were
22 utilized in furtherance of the ongoing unlawful scheme." Id.; see
23 also In re Grand Jury Investigation, 842 F.2d 1223, 1226 (11th Cir.
24 1987) ("[A] prima facie showing can be established by a good faith
25 statement by the prosecutor as to what evidence is before the grand
26 jury."). Reasonable cause is "more than suspicion but less than a
27 preponderance of evidence." Chen, 99 F.3d at 1503; see also United
28 States v. Laurins, 857 F.2d 529, 541 (9th Cir. 1988) (holding that

1 government had made prima facie showing based on "evidence that if
2 believed by the jury would establish the elements of an ongoing
3 violation" with which attorney-client communications "were linked").

4 As one leading treatise states:

5 The test resembles that used for search warrants or
6 directed verdicts in that the judge's function is not to
7 determine issues of credibility or whether a particular
8 inference should be drawn, but rather to see what
9 conclusions could be reached if the witnesses were credited
10 and the permissible inferences drawn.

11 24 Wright & Graham, Federal Practice and Procedure: Evidence § 5501
12 at 525 (1986) ("Wright & Graham").

13 **B. Procedure for Determining Applicability of Exception**

14 Following the Supreme Court's decision in United States v.
15 Zolin, 491 U.S. 554 (1989), there is a two-step process to determine
16 the applicability of the crime-fraud exception.

17 First, before the Court may examine the purportedly privileged
18 materials in camera, the government must provide non-privileged
19 evidence² "adequate to support a good faith belief by a reasonable
20 person that in camera review of the [privileged] materials may reveal
21 evidence to establish the claim that the crime-fraud exception
22 applies." Id. at 572; see also Chen, 99 F.3d at 1503 (describing
23 "the Zolin two-step procedure"). The showing necessary for in camera
24 review is significantly less than the prima facie showing necessary
25 for application of the exception; as the Court stated in Zolin, "The
26 threshold we set, in other words, need not be a stringent one." Id.;
27 see also In re Grand Jury Investigation, 974 F.2d at 1072-73 (stating

28 ² "We conclude that the party opposing the privilege may use any
nonprivileged evidence in support of its request for in camera
review, even if its evidence is not 'independent' of the contested
communications as the Court of Appeals uses that term." Zolin, 491
U.S. at 574.

1 that district court erred, albeit harmlessly, by applying too
2 stringent a standard and noting, "[t]here is an important difference
3 between showing how documents may supply evidence that the crime-
4 fraud exception applies and showing directly that the exception
5 applies").

6 Second, "if the judge decides this question in favor of the
7 government, the otherwise privileged material may be submitted for in
8 camera examination." Chen, 99 F.3d at 1503.

9 **C. Step One of the Zolin Two-Step Process Has Been Met**

10 The non-privileged evidence available to the Court is more than
11 sufficient to support "a good faith belief by a reasonable person
12 that in camera review of the [privileged] materials may reveal
13 evidence to establish the claim that the crime-fraud exception
14 applies." Zolin, 491 U.S. at 572. The independent evidence shows
15 that (1) defendant Chavez used his position as an attorney to pass
16 criminal messages for Mexican Mafia members and associates, including
17 through mail disguised as "legal mail"; (2) defendant Chavez passed
18 criminal messages specifically to and from, and regarding, Gabriel
19 Huerta; (3) the **Letter** is dated during the course of defendant
20 Chavez's participation in the conspiracy; and (4) defendant Chavez
21 does not appear to have served as the attorney of record for Huerta
22 in any legal or administrative proceedings. All of these factors
23 readily establish a prima facie case for application of the crime-
24 fraud exception to the communication. Moreover, a Superior Court
25 Judge in Kern County has already determined that there was probable
26 cause to search the **Letter** for evidence of a crime. See Exhibit B.
27 Under Zolin, this provides ample support for an in camera review of
28

1 the **Letter** that the privilege review team will provide in a
2 subsequent filing.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the government respectfully requests
5 that this Court sign the Proposed Order lodged herewith and agree to
6 review, in a subsequent filing, the May 31, 2015 **Letter** from
7 defendant Chavez to Gabriel Huerta to determine whether the attorney-
8 client privilege is abrogated by the crime-fraud exception.

DECLARATION OF GREGG E. MARMARO

I, Gregg E. Marmaro, declare as follows:

1. I am an Assistant United States Attorney in the United States Attorney's Office for the Central District of California. I am one of the attorneys representing the government in this case.

2. I have received and reviewed records from the California Department of Corrections and Rehabilitation ("CDCR"), Board of Parole Hearings ("BPH"), regarding the parole histories of CDCR inmates whom defendant Gabriel Zendejas-Chavez visited or corresponded with, including Gabriel Huerta. Based on a review of parole history records for Gabriel Huerta, as well as my conversations with CDCR-BPH, I am aware that defendant Chavez never appeared as an attorney of record for Huerta in any parole proceedings, and that Huerta was represented by other attorneys in parole proceedings in 2015. Based on my conversations with CDCR-BPH, I am aware that if an attorney is privately retained by an inmate but does not file any materials with CDCR-BPH or never makes an appearance as an attorney, then such private retention would not be reflected in CDCR-BPH records. Nonetheless, the review of records indicates that defendant Chavez never appeared as an attorney in parole proceedings for inmate Huerta.

3. On April 17, 2024, I and other members of the prosecution team received from the privilege review taint team a privilege log indicating that a letter dated May 31, 2015, from defendant Chavez to inmate Huerta, was withheld on the basis of the attorney-client privilege (the **Letter**). Attached as **Exhibit A** is a true and correct copy of the privilege log.

1 4. The prosecution team also received from the taint team a
2 search warrant application and search warrant, dated June 4, 2015,
3 from the Superior Court in Kern County, California, which authorized
4 the search of the **Letter** by prison officials at a California state
5 prison in Tehachapi, California. Attached as **Exhibit B** is a true and
6 correct copy of the search warrant application and search warrant.

7 I declare under penalty of perjury under the laws of the United
8 States of America that the foregoing is true and correct and that
9 this declaration is executed at Los Angeles, California, on May 23,
10 2024.



GREGG E. MARMARO
Assistant United States Attorney